Nos. 08-4241, 08-4243, 08-4244 (consolidated)

IN THE

United States Court of Appeals for the Seventh Circuit

OTIS MCDONALD, ET AL., *and*

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ET AL., *and* VILLAGE OF OAK PARK,

Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of Illinois
Hon. Milton I. Shadur, Senior District Judge

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT
Fed. R. App. P. 26.1, Circuit Rule 26.1

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2) The names of all law firms whose partners or associates have appeared for the party in the case (including administrative proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Amici are represented by Constitutional Accountability Center (CAC), a non-profit public interest law firm, think-tank, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC lawyers on this brief are: Douglas T. Kendall, Elizabeth B. Wydra (counsel of record) and David H. Gans.

3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any:

None.

and

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

_____
Elizabeth B. Wydra

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INTEREST OF THE AMICI CURIAE

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. Certain of *amici*'s relevant publications are cited in this brief. *Amici* are:

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Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2816 (2008), may be regulated to a certain extent.

All parties consent to the filing of this amicus brief.

SUMMARY OF ARGUMENT

The parties—and the district court below—all agree that the threshold question in this case is whether the individual right to bear arms recently recognized by the Supreme Court in *District of Columbia v. Heller*, and applied in the context of the federal government and the District of Columbia, must also be protected against state infringement. In modern Supreme Court jurisprudence, the most common means of "incorporating" rights enumerated in the Bill of Rights against the states

has been under the Due Process Clause of the Fourteenth Amendment. However, the textually and historically accurate approach to determining whether the Fourteenth Amendment protects an individual right to keep and bear arms is to look to the Privileges or Immunities Clause of the Fourteenth Amendment. Undertaking this inquiry, *amici* submit to the Court that it is clear that the framers of the Fourteenth Amendment sought to constitutionally protect an individual right to keep and bear arms against state infringement, in large part because they wanted the newly freed slaves to have the means to protect themselves, their families and their property against well-armed former rebels.

Precedent does not preclude the Court from following this constitutionally-faithful method of incorporation. While the *Slaughter-House Cases* read the Privileges or Immunities Clause so narrowly as to render it practically meaningless—completely ignoring the contrary text, history and purpose of the Fourteenth Amendment—and its progeny stand for the proposition that the Fourteenth Amendment does not apply the Bill of Rights to the states, this line of precedent has been so completely undermined by subsequent Supreme Court incorporation decisions that there no longer remains any justification for its continued application.

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS FUNDAMENTAL RIGHTS OF CITIZENSHIP AGAINST STATE INFRINGEMENT.

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make former slaves into equal citizens in the new republic, securing for

the nation the "new birth of freedom" President Lincoln promised at Gettysburg. In two short sentences, Section One of the Fourteenth Amendment wrote equal citizenship into our constitutional design, mandating that States abide by fundamental constitutional principles of liberty, equality, and fairness. Its words provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, section 1.

Leading proponents and opponents alike of the Fourteenth Amendment understood it to protect substantive, fundamental rights—including the rights enumerated in the Constitution and Bill of Rights. The framers of the Fourteenth Amendment acted against a historical backdrop that required them to protect at least the liberties of the Bill of Rights: they were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both freed slaves and white Unionists. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) ("The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women, too."). Starting around 1830, southern states enacted laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by

death. *Id.* at 161; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986). Political speech was repressed as well, and Republicans could not campaign for their candidates in the South. *Id.* at 31. To prevent states from continuing to violate some of the core rights of our original Constitution, the Fourteenth Amendment framers added the Privileges or Immunities Clause to the Constitution.

A. The Plain Meaning Of The Privileges Or Immunities Clause Shows That The Provision Was Intended To Protect Fundamental, Substantive Rights.

The opening words of the Fourteenth Amendment announce a new relationship between federal and state governments and between the people and their Constitution. By affirming U.S. citizenship as a birthright and declaring federal citizenship "paramount and dominant instead of being subordinate and derivative," *Arver v. United States*, 245 U.S. 366, 389 (1918), the Amendment marked a dramatic shift from pre-war conceptions of federalism and expressly overruled the Supreme Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S. citizen under the Constitution because of his race. *See also* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 884 (1986) (arguing that through the Reconstruction Amendments and civil rights statutes "Northern Unionists imposed upon the nation their view of national supremacy," including "the primacy of national authority to secure and enforce the civil rights of United States citizens").

The framers of the Fourteenth Amendment made sure that the full and equal citizenship they established in the first words of Section One was no empty promise. In the Privileges or Immunities Clause, they explicitly guaranteed that citizens would enjoy all fundamental rights and liberties: "the privileges or immunities of citizens of the United States."[1] From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, at 166-69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-1136 (2000). For example, when James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is…." 1 Annals of Congress 453, 458 (1789); *see also id.* at 766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America"). This view of the privileges

[1] This focus on full and equal citizenship did not mean that the Reconstruction framers were unconcerned with the rights of non-citizens. John Bingham, principal author of the Fourteenth Amendment, believed that no state could violate the Constitution's "wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers." Cong. Globe, 35th Cong., 2d Sess. 983 (1859). As explained by Professor Akhil Amar, the "privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles (which Bingham saw as paired if not synonymous) would protect the wider category of persons." AMAR, at 182. *See also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 68 (1993) ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

and immunities of citizenship was common ground in American constitutional thought from the founding up through the Civil War; those words had specific and powerful meaning to those who wrote them into the Constitution.

As crafted, the Privileges or Immunities Clause was meant to secure the substantive liberties protected by the Bill of Rights, as well as unwritten fundamental rights of citizenship. The Clause is also "the natural textual home for…unenumerated fundamental rights." *See* Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are rights protected by the Constitution not spelled out in the text. *See* Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006). As one member of the Reconstruction Congress observed during the debates on the Fourteenth Amendment:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of – "life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c; and then lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.

Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye). Indeed, one preeminent constitutional scholar has suggested that the individual right to bear arms for the protection of person and property at issue in *Heller* has more to do with the Ninth

and Fourteenth Amendments than the words of the Second Amendment. Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174-77 (2008). But whether the individual right to bear arms is protected by incorporating the Second Amendment or looking to an unenumerated right protected by the Ninth and Fourteenth Amendments, the textual home for the guaranteed protection of that substantive right is the Privileges or Immunities Clause.

B. The Legislative History Of The Fourteenth Amendment Shows That The Privileges Or Immunities Clause Was Intended To Encompass Fundamental Rights, Including The Bill Of Rights.

The debates in Congress confirm what the plain text of the Fourteenth Amendment provides: the Privileges or Immunities Clause secures the fundamental, substantive constitutional rights of citizens.

Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction, offered the most comprehensive analysis of the Privileges or Immunities Clause in the Senate debates on the Amendment. Relying heavily on *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), an influential 1823 decision interpreting the Privileges and Immunities Clause contained in Article IV, Section Two of the Constitution,[2] Sen. Howard made clear that the Privileges or Immunities Clause of the Fourteenth Amendment would afford broad protections to substantive liberty, encompassing all "fundamental" rights enjoyed by "citizens of all free Governments": "protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and

[2] Article IV, Section Two provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551).

Sen. Howard also made clear that these substantive "privileges or immunities" included those liberties protected by the Bill of Rights. *See* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1562-63 (2007). He noted the "privileges and immunities" of citizens "are not and cannot be fully defined in their entire extent and precise nature," but to these unenumerated rights

> should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> . . . [T]hese guarantees…stand simply as a bill of rights in the Constitution…[and] States are not restrained from violating the principles embraced in them….The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

Representative John Bingham, the principal author of Section One of the Fourteenth Amendment, also made it abundantly clear that the substantive privi-

leges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. In explaining why the Fourteenth Amendment was necessary, Bingham cited the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Bingham retained this understanding of what the Privileges or Immunities Clause protected. In 1871, after the ratification of the Fourteenth Amendment, he explained:

> [T]he privileges or immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows. [Bingham read the first eight amendments word for word.] These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871). *See generally* Aynes, 103 YALE. L.J. at 74.

Other prominent members of the Reconstruction Congress shared the same view of the privileges and immunities of national citizenship as Sen. Howard and Rep. Bingham. Prior to the drafting of the Fourteenth Amendment, Representative James Wilson, chairman of the House Judiciary Committee, stated that "[t]he people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1202-03 (1864). *See* CURTIS, at 37-38. During debates in the House of Representatives on

the Fourteenth Amendment, Thaddeus Stevens, a political leader in the House and head of the House delegation of the Joint Committee on Reconstruction, explained that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect…." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment—and in most instances, the Privileges or Immunities Clause specifically—protected against state infringement substantive, fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single Senator or Representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, at 187; CURTIS, at 91; Kaczorowski, 61 N.Y.U. L. REV. at 932. To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, speaker after speaker affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship. Time and again, members of the Reconstruction Congress explained that the Fourteenth Amendment would require state governments to adhere to the guarantees of the Bill of

Rights,[3] as the original Constitution had not, and give Congress the power to enforce their guarantees.[4] As Sen. Howard had done, many invoked *Corfield*'s broad definition of privileges and immunities, promising that the newly freed slaves would have all the fundamental rights of citizenship.[5]

II. THE FRAMERS OF THE FOURTEENTH AMENDMENT INTENDED AN INDIVIDUAL RIGHT TO BEAR ARMS TO BE AMONG THE CONSTITUTIONALLY PROTECTED PRIVILEGES OR IMMUNITIES OF CITIZENSHIP.

The text and history of the Privileges or Immunities Clause demonstrate that it was intended to protect substantive rights, including those enumerated in the Bill of Rights and other, unenumerated, fundamental rights of citizenship. The history of the Clause further shows that an individual right to keep and bear arms for protection of person and property was among the privileges and immunities of citizens protected against state infringement under the Fourteenth Amendment.

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[3] *See* Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye) ("Will it be contended…that any State has the power to subvert or impair the natural and personal rights of the citizen?"); *id.* at 1153 (Sen. Thayer) ("if the freedmen are now citizens…they are clearly entitled to those guarantees of the Constitution of the United States, which are intended for the protection of all citizens."); *id.* at 2465 (Sen. Thayer) ("[I]t simply brings into the Constitution what is found in the Bill of Rights in every State of the Union.").

[4] *See* Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (Rep. Donnelly) ("Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty, and property to fall to the ground for lack of power to enforce them?…Or shall that great Constitution be what its founders meant it to be, a shield and protection over the head of the lowliest and poorest citizen…."); *id.* at 1088 (Rep. Woodbridge) ("It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty…."); *id.* at 1094 (Rep. Bingham) ("I urge the amendment for the enforcement of these essential provisions of the Constitution..., which declare that all men are equal in the rights of life and liberty before the majesty of American law.").

[5] See Cong. Globe, 39th Cong., 1st Sess. 474-75 (1866) (Sen. Trumbull) (invoking *Corfield*); *id.* at 1117-18 (Sen. Wilson) (same); *id.* at 1837 (Rep. Lawrence) (same); *see also id.* at 1266 (Rep. Raymond) ("[T]he right of citizenship involves everything else. Make the colored man a citizen and he has every right which you and I have as citizens of the United States under the laws and the Constitution of the United States."); *id.* at 1757 (Sen. Trumbull) ("To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights, which belong to free citizens or free men in all countries….").

The framers of the Fourteenth Amendment were particularly concerned with the right of freedmen to bear arms. *See* Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991). The efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change." *Id.* As constitutional historians have noted, "Reconstruction Republicans recast arms bearing as a core *civil* right….Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, at 258-59. In fact, far from fulfilling the Founders' vision of state militias as bulwarks of liberty, various southern white militias perpetrated rights deprivations suffered by African Americans in the South: "Confederate veterans still wearing their gray uniforms…frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them"); *id.* at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia.").

Central in the minds of the framers were the Black Codes, the South's post-war attempt to re-institutionalize slavery in a different guise. The Black Codes systematically violated the constitutional rights of the newly freed slaves in myriad ways, including by prohibiting the former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, at 35.[6] *See also Heller*, 128 S.Ct. at 2841 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). These abuses were investigated and reported to Congress by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Joint Committee drafted the Fourteenth Amendment in Congress, and thus their findings bear directly on the Amendment they constructed. Their findings, issued in a June 1866 report, were also distributed widely throughout the country—150,000 copies were issued. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914). The Joint Committee's report confirmed through an exhaustive fact-finding effort the systematic violation of constitutional rights in the South and the need for guaranteeing basic human and civil rights.

On the issue of the right to bear arms the Joint Committee reported testimony that, in the South, "[a]ll of the people…are extremely reluctant to grant to the

[6] For discussions of the Black Codes in Congress, see Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he planters are disposed…to insert into their contracts tyrannical provisions…to prevent the negroes from leaving the plantation…or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION Pt. II, 4 and Pt. II, 240 (1866). *See generally* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L. J. 341 (1995) (presenting chronologically key testimony heard by the Joint Committee on southern efforts to disarm freedmen and Unionists). Members of the Reconstruction Congress echoed these concerns. Senator Pomeroy explained that the newly freed slaves should guaranteed the "essential safeguards of the Constitution," including the right of bearing arms, and noted that southern states had denied blacks the right to keep and bear arms. 39th Cong. Globe, 1st Sess. at 1183, 1837-38. Representative Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 517.

The Reconstruction Congress first acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill.[7] Seek-

[7] The Reconstruction Congress also passed the Civil Rights Act of 1866, which provided that "all persons born in the United States and not subject to any foreign power…are hereby declared to be citizens of the United States" and "shall have the same right…to the *full and equal benefit of all laws and proceedings for the security of person and property*, as is enjoyed by white citizens." 14 Stat. 27 (1866) (emphasis added). While the right to bear arms was not expressly included in the Act, it was widely understood that "laws and proceedings

ing to prevent the Black Codes from perpetuating the wrongs of slavery, the bill provided that African Americans should have "the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*." Cong. Globe, 39th Cong, 1st Sess. at 654, 743, 1292 (Rep. Bingham) (emphasis added). *See also id.* at 654 (Rep. Eliot) (proposing the addition of the words "including the constitutional right to bear arms"); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected "the constitutional right to bear arms"). Because there was some question over whether Congress had the power to enforce against the states the protections of the Bill of Rights and the fundamental rights articulated in Reconstruction civil rights legislation, the 39th Congress proposed the Fourteenth Amendment, which made explicit the constitutional guarantee of fundamental rights against state infringement.

As discussed *supra* Section I.B., the most prominent supporters of the Amendment expressly stated their understanding that the Privileges or Immunities Clause protected at least those rights set forth in the Bill of Rights. Sen. Pomeroy listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866); *see also id.* ("And if the cabin door of the freedmen is broken open…then should a well-loaded musket be in the hands of the occupant to send the polluted wretch to another world…."). Sen. Howard defined the privileges or immunities of citizenship protected by the Amendment to include "the personal rights

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for the security of person and property" included liberties set forth in the Bill of Rights, including the right to keep and bear arms. CURTIS, at 71-72.

guaranteed and secured by the first eight amendments of the constitution….such as….the right to keep and bear arms." *Id.* at 2765. Having expressly included "the right to keep and bear arms" as among the personal rights guaranteed by the Bill of Rights, Sen. Howard explained that "the great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. *See also id.* at 1073 (Sen. Nye) ("As citizens of the United States, they have equal right to protection, and to keep and bear arms for self defense.")

As noted *supra* in Section I.B., no member of Congress disputed the idea that the privileges or immunities of citizenship included at least those rights enumerated in the Bill of Rights. Indeed, in at least one instance opposition to the Privileges or Immunities Clause confirms that the Clause would protect these rights, including the right to bear arms: Senator Reverdy Johnson of Maryland supported the Citizenship and Due Process Clauses of the Fourteenth Amendment but was opposed to the Privileges or Immunities Clause; having served as counsel for the slave owner in *Dred Scott*, Sen. Johnson was fully aware that protecting the privileges or immunities of citizenship for all "would give to persons of the negro race…the full liberty…to keep and carry arms wherever they went," *Dred Scott*, 60 U.S. at 416-17. *See also* Aynes, 103 YALE L.J. at 98 (noting that even "Fourteenth Amendment opponent Senator Reverdy Johnson" "agreed that the privileges and immunities protected by the Fourteenth Amendment included the right to keep and bear arms"). The Reconstruction Congress was fully aware—and the drafters of the Fourteenth

Amendment fully intended—that the right to bear arms to protect self, family, and property was part of the full and equal citizenship guaranteed by the amended Constitution.

III. PRECEDENT DOES NOT PREVENT THE COURT FROM RECOGNIZING THAT THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS AN INDIVIDUAL RIGHT TO BEAR ARMS AGAINST STATE INFRINGEMENT.

This Court should follow the text and history described above to find that the Privileges or Immunities Clause of the Fourteenth Amendment protects an individual right to bear arms. While certain lines of precedent may be seen as impediments to this constitutionally-faithful method of incorporation, they do not in fact preclude such a decision here. *See* McDonald Br. at 33 (noting that the court "is not bound by precedent that does not speak to the claims before it").

A. *Slaughter-House* And Its Progeny Were Wrong As A Matter Of Text And History And Have Been Completely Undermined By The Supreme Court's Subsequent Application Of Most Of The Bill Of Rights To The States.

Despite the clear understanding that the Privileges or Immunities Clause was included in the Fourteenth Amendment to protect substantive rights and liberties, the Clause has never fulfilled its promise. Within a few short years of ratification, the Supreme Court effectively wrote the Privileges or Immunities Clause out of the Fourteenth Amendment in its decision in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and held that the protections of the Bill of Rights limited only the federal government in *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the First and Second Amendments secure rights only against federal infringement), re-

flecting a national mood that had grown weary of the project of Reconstruction. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 38 (2007) (arguing that "there can be no doubt that *Slaughter-House* and *Cruikshank* reflected America's loss of will to memorialize the reforms begun in the late-1860s").

The actual decision in *Slaughter-House* is noncontroversial: the Court rejected petitioners' claim that the Louisiana legislature had violated their fundamental rights of citizenship by granting to a single slaughtering company a monopoly on the butchering of animals within the city of New Orleans. Indeed, kept to the four corners of the opinion, *Slaughter-House* is not necessarily dispositive on the question of whether the Privileges or Immunities Clause protects an individual right to bear arms against state infringement because such a right was not at issue nor is it anywhere referenced by the majority. While the Court provided some examples of privileges or immunities pertaining to national citizenship that could not be abridged by the states, it expressly "excused" itself from "defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so." 83 U.S. at 78-79.[8]

[8] None of the cases following *Slaughter-House* addressed whether the Privileges or Immunities Clause protected the right to bear arms. *See Maxwell v. Dow*, 176 U.S. 581 (1900) (holding that a state statute mandating a criminal trial with a jury of eight persons did not violate the Privileges or Immunities Clause, even though the Sixth Amendment requires a jury of twelve persons for federal criminal cases); *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that the Fifth Amendment's privilege against self-incrimination does not apply to the states under the Privileges or Immunities Clause). While *Cruikshank* held that the

Unfortunately, in the process of rending a rather mundane decision, the *Slaughter-House* five-Justice majority did its best in *dicta* to eviscerate the full promise of the Privileges or Immunities Clause by interpreting the Clause to protect only rights related to the workings of the federal government, such as the right to access navigable waters, with virtually all fundamental rights remaining subject to the protection of the states. *Id*. at 74-75.

But even though *Slaughter-House* and *Cruikshank* together stand for the proposition that the Bill of Rights does not limit the states, this proposition has been completely undermined by the Supreme Court's subsequent incorporation of most of the Bill of Rights as a limit on the states. In overruling earlier cases such as *Maxwell*, *Twining*, and *Adamson v. California*, 332 U.S. 46 (1947),[9] the Court has rejected the foundation upon which *Slaughter-House* was built—the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look to state government for the protection of their rights, save only those few rights connected to the workings of the federal government.

The *Slaughter-House* majority opinion's analysis and reading of the Privileges or Immunities Clause has not only been undermined by subsequent precedent—it is fundamentally, unquestionably, troublingly wrong. It completely ignored the

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Second Amendment secured a right only against the federal government, it did not conduct an inquiry into whether the Fourteenth Amendment incorporated that right and did not consider the Privileges or Immunities Clause. *See Heller*, 128 S.Ct. at 2813 n.23.

[9] *See, e.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson*); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*).

text and history described above in Sections I and II and refused to acknowledge that the Fourteenth Amendment did, in fact, nationalize fundamental rights of citizenship and intended to place important rights beyond the reach of the states. As one of the framers of the Fourteenth Amendment, Senator George Franklin Edmunds, said at the time of the decision, the *Slaughter-House* Court's view of the Privileges or Immunities Clause "radically differed" from the framers' intent. CURTIS, at 177. Other framers called *Slaughter-House* a "great mistake," Cong. Rec., 43rd Cong., 1st Sess. 4116 (1874) (Sen. Boutwell), which had perverted the Constitution by "assert[ing] a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States." *Id.* at 4148 (Sen. Howe). *See also* Lawrence, 72 MO. L. REV. at 29-35. Moreover, *Slaughter-House* and *Cruikshank* are inescapably tainted by political and social influence—a commentator as early as 1890 viewed *Slaughter-House* as "intensely reactionary" and predicted with confidence that the decision would be overruled. *Id.* at 33 (quoting an 1890 statement made by political scientist John W. Burgess). Finally, the reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to consensus among leading constitutional scholars today, who agree that the opinion is flat wrong.[10]

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[10] *See, e.g.*, AMAR, at 163-230; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000). The arguments of these, and many other, scholars have demolished *Slaughter-House* everywhere but the Court. "Virtually no serious modern scholar – left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

In short, the foundation for *Slaughter-House* has been utterly destroyed by modern Supreme Court jurisprudence and its fatal flaws revealed by the light of history and scholarship. The promise of substantive, fundamental rights protection the Reconstruction framers wrote into the Privileges or Immunities Clause should not remain buried by continuing reliance upon *Slaughter-House*.

B. The Privileges Or Immunities Clause Is The Appropriate Vehicle For Incorporating The Substantive Rights Enumerated In The Bill Of Rights.

The Privileges or Immunities Clause is the appropriate vehicle for incorporating against the states the substantive fundamental rights secured to all Americans by the Bill of Rights, including the Second Amendment. As Section I, *supra*, demonstrates, the text of the Privileges or Immunities Clause is an explicit textual direction to protect the substantive fundamental rights of all Americans, and the natural starting point for finding these substantive fundamental rights is in the Bill of Rights itself. History overwhelmingly confirms that this was the original public meaning of the Clause. As Justice Harlan made the point in one of his prescient dissenting opinions: "[t]he privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty . . . was thus secured to every citizen of the United States, and placed beyond assault by every government . . . ." *Twining*, 211 U.S. at 123 (Harlan, J., dissenting).

The Supreme Court's incorporation cases involving substantive fundamental rights have never considered these arguments. Instead, the Court has used the Due Process Clause of the Fourteenth Amendment as the vehicle to incorporate substan-

tive fundamental rights. For example, in *Gitlow v. United States*, 268 U.S. 652, 666 (1925), the Court treated the First Amendment right to freedom of speech as properly incorporated because it is "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."

Gitlow is, of course, correct—states may not deprive individuals of their freedom of speech without observing the commands of due process, as they might by instituting a system of prior restraint. *See Near v. Minnesota*, 283 U.S. 697 (1931). But the Constitution demands that that States must respect the right of freedom of speech, and other expressive guarantees spelled out in the First Amendment, not only because it is part of the liberty protected by the Due Process Clause, but more fundamentally because freedom of expression is a substantive fundamental right secured and protected from abridgement by the Privileges or Immunities Clause.

The guiding principle of the Court's most recent incorporation cases is that it must "'look[] to the specific guarantees of the (Bill of Rights) to determine whether a state criminal trial was conducted with due process of law.'" *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Washington v. Texas*, 388 U.S. 14, 18 (1967)). As *Benton* observed, the Court has repeatedly held that the specific rights enumerated in the Bill of Rights are a measure of what due process requires, rejecting an earlier, nontextualist approach that simply asked whether a specific right listed in the Bill of the Rights was necessary for fundamental fairness. *See Benton*, 395 U.S. at 794-95. But the Due Process Clause is not, and was not written to be, the sole ave-

nue for protecting all the rights enumerated in the Bill of Rights from state invasion. In this case, the Court should turn to the words of the Fourteenth Amendment that protect substantive rights of citizenship—the Privileges or Immunities Clause.

C. Previous Supreme Court Cases Addressing The Second Amendment Right To Bear Arms Are Not Dispositive Here.

Supreme Court precedent addressing the Second Amendment right to bear arms does not preclude the Privileges or Immunities Clause analysis described above.

As argued by the appellants in their opening briefs, *see* McDonald Br. at 33-36; NRA Br. at 26-35, the Supreme Court's opinion in *Heller* explains in detail why precedent previously thought to preclude a constitutionally-protected individual right to bear arms does not, in fact, foreclose such an interpretation. *Cf. Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (explaining that the Supreme Court's decisions in *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Miller*, 307 U.S. 174 (1939), foreclose the argument that there is an individual right to bear arms in self-defense that is protected under the Constitution against state action). Accordingly, with no general impediment in Supreme Court precedent to the recognition of an individual right to bear arms under the Constitution, the question is then whether such a right may be recognized to protect against *state* infringement.

The Court in *Heller*, while noting that the incorporation question was not before the Court, explained that its precedent applying the Second Amendment only to the federal government "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S.Ct. at 2813 n.23. A close reading of the cases bears this point out. *See* NRA Br. at 26-30. With the way cleared for an inquiry into whether the Fourteenth Amendment protects against state infringement an individual right to keep and bear arms, the Court should faithfully apply the text and history of the Fourteenth Amendment, as recounted above, and find that the Privileges or Immunities Clause protects this individual right.

* * *

The text and history of the Fourteenth Amendment establish that the Privileges or Immunities Clause was intended to protect substantive, fundamental rights—including at least those rights enumerated in the original Constitution and Bill of Rights—against state infringement. The legislative history from the Reconstruction Congress demonstrates that an individual right to keep and bear arms was among the rights protected as a privilege or immunity of U.S. citizenship. Accordingly, *amici* urge the Court to find that the Privileges or Immunities Clause protects an individual right to keep and bear arms against state infringement.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court reverse the incorporation ruling and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,915 words, excluding the parts of the brief excluded by Fed, R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font (with footnotes in 11-point Century Schoolbook font).

Executed this 4th day of February, 2009.

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Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I, Elizabeth Wydra, hereby certify that I served two true and correct copies of the foregoing Brief of *Amici Curiae* on the following by U.S. mail, first-class postage prepaid:

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I further certify that on this, the 4th day of February, 2009, I served the electronic copy of the foregoing Brief of *Amici Curiae* on the above-listed counsel by email to sloose@cityofchicago.org, lcmalina@ktjnet.com, protell@aol.com, and dsigale@sigalelaw.com. The brief was also filed this day by sending 15 copies to the Clerk, along with a disk checked for viruses containing a non-scanned PDF copy of the brief (pursuant to Circuit Rule 31(E)(1)), via Federal Express.

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